ALEXANDER L. STEVAS
CLERK

No. 82-6798

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PAUL AUCLAIR, Appellant,

v.

STATE OF WYOMING, Appellee

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WYOMING

MOTION TO DISMISS

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Appellee, pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States, moves the court to dismiss the appeal herein for the reasons and on the grounds hereinafter set forth.

STATEMENT

This is an appeal from an order of the Wyoming Supreme Court which affirmed the conviction of the Appellant on charges of incest. The facts underlying the appeal are as follows:

On October 23, 1981, officials from the Wyoming Department of Public Assistance and Social Services and the Chief of Police of Powell, Wyoming, Bob Coorough, were told by the

Appellant's daughter that the Appellant had been involved in an incestuous relationship with her. Based on this information, a complaint was made and filed by Chief Coorough on October 24, 1981. On the same day an arrest warrant was issued for Appellant's arrest.

On October 25, 1981, Chief Coorough interviewed the Appellant who went to the Powell Police Station voluntarily. Appellant denied the allegations his daughter had made. After the interview, Appellant was allowed to go home despite the outstanding arrest warrant. Chief Coorough later explained he wanted to receive medical reports from a physician who had examined the victim in order to corroborate the victim's story prior to arrest. These reports were received on October 26, 1981.

On the same day, Chief Coorough arranged a telephone conversation between the Appellant and his daughter. This conversation was arranged after the Appellant requested a chance to talk to his daughter during the October 25th interview. The conversation was taped at the request of the police and the daughter was instructed to deny the conversation was being recorded if the Appellant questioned her. At one point in the conversation, the Appellant concluded the conversation was being recorded but indicated he did not care. Later during the evening of the 26th, Appellant was arrested and charged with incest.

At trial, the prosecution attempted to introduce portions of the transcript of this recording into evidence. Appellant objected on Fourth Amendment grounds, arguing that an

illegal wiretap was involved. That objection was overruled and the transcript was allowed into evidence. Appellant was subsequently convicted of incest pursuant to Wyoming Statutes Section 6-5-102, [illegible]77.

On appeal to the Wyoming Supreme Court the Appellant abandoned the Fourth Amendment claim. It was argued instead that the telephone conversation amounted to a surreptitous interrogation of the Appellant which violated his right to counsel under the Sixth Amendment. The Wyoming Supreme Court never reached the issue of whether the Appellant's right to counsel was violated. Rather, the Court found that the Sixth Amendment right to counsel had not attached at the time of the conversation. They held that the existence of an arrest warrant and complaint did not constitute judicial proceedings sufficiently adverserial in nature to indicate the judicial proceedings involved constituted a critical stage in the judicial process. After a survey of cases from both the Wyoming and United States Supreme Court, the Wyoming Supreme Court held that there was no precedent which would indicate that the Sixth Amendment right to counsel attaches when an arrest warrant and complaint issue and nothing further has occurred.

ARGUMENT

The appeal herein fails to present a substantial federal question in that the Sixth Amendment issue upon which Appellant bases his appeal has been so explicitly decided by prior decisions of this Court that further argument on the issue is foreclosed. The authorities discussed below establish that the Sixth Amendment right to counsel does not accrue

merely because a complaint has been filed and arrest warrant has issued. When prior decisions of this Court provide a clear resolution to the issue presented on appeal and the decision of the court below comports with those decisions, the appeal should be dismissed as not presenting a substantial federal question. Equitable Life Assurance Society of the United States v. Brown, 187 U.S. 309, 314, 47 L.Ed. 190, 193, 23 S.Ct. 123 (1902); Rosoto v. Warden, 11 L.Ed.2d 15, 16, 83 S.Ct. 1788 (1963); Sup.Ct.R. 16.1(b).

The issue before the Court is whether Appellant's Sixth Amendment right to counsel attached at the time the criminal complaint was filed and the arrest warrant issued. Appellant states the issue as whether the phone conversation on October 26, 1981, amounted to a surreptitous interrogation of the Appellant in violation of his Sixth Amendment right to counsel. However, the opinion of the Wyoming Supreme Court never reached the issue of a violation of the right to counsel since they held the right to counsel never attached. Auclair v. State, Wyo., 660 P.2d 1156 (1983).

The United States Supreme Court has, in several landmark decisions, set out guidelines which mandate the order of the Wyoming Supreme Court affirming the conviction of Appellant. These precedents govern the time at which the right to counsel attaches. The test employed in this case was whether adverserial judicial proceedings had been initiated. Auclair v. State, supra at 1161. This is entirely consistent with the test adopted by this Court.

> This review of the history and expansion guarantee demonstrates that the

> test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary. (Emphasis added).

United States v. Ash, 413 U.S. 300, 313, 37 L.Ed.2d 619, 628, 93 S.Ct. 2568 (1973).

As the Wyoming Supreme Court noted, adverse judicial proceedings had not commenced under the standards of this Court and that is the point which is critical in determining whether right to counsel has attached. Auclair v. State, supra at 1161.

> But the point is that, while members of the Court have differed as to the existence of the right to counsel in the contexts of some of the above cases, all of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings. . . . (Emphasis added).

Kirby v. Illinois, 406 U.S. 682, 689, 32 L.Ed.2d 411, 417, 92 S.Ct. 1877 (1972).

A subsequent search by counsel for both sides, the Wyoming Supreme Court, and the writer here, indicates that no intervening precedent has altered these principles.

Unlike cases involving arrest and arraignment or even preliminary hearing, it is not clear that the government had committed itself to prosecution. The complaint and arrest warrant has not been acted on and, in fact, Chief Coorough had decided not to act on them until the evening of the day of the phone conversation. They were not actually executed until after the conversation. Under such circumstances, adverserial

criminal judicial proceedings could not have been said to have commenced. cf. Moore v. Illnois, 434 U.S. 220, 228, 54 L.Ed.2d 424, 434, 98 S.Ct. 458 (1977). It is only after the government commits itself to prosecution and the adverse positions of the state and defendant are clear and solidified that adverserial proceedings are commenced. Kirby v. Illinois, supra at 689-690. It is at this point that the defendant finds himself facing the organized forces of society and finds himself immersed in the procedural and substantive intricacies of criminal law. Id. at 689.

The foregoing authority amply illustrate the clear rule that the Sixth Amendment right to counsel only attaches when adverse criminal judicial proceedings are commenced. It is equally clear that adverse criminal judicial proceedings had not commenced in this case for the following reasons. First, it is clear from the record that no definite decision to prosecute had been made even though a complaint had been filed and an arrest warrant had issued. Chief Coorough's testimony indicates that he had not decided to arrest Appellant pending corroborating medical reports. Second, there was no indication that the State had taken a position adverse to the Appellant. The arrest warrant had not been executed, nor was Appellant even aware of its existence. Third, for what reason did Appellant need aid in confronting the prosecution? They had not even brought the powers and resources of the State to bear against Appellant at the time of the phone conversation. In fact, Appellant was not even aware that a warrant for his arrest had issued.

Appellant also contends that it would be improper to

allow the police to obtain an arrest warrant and file a criminal complaint and then fail to promptly execute the warrant. Appellant contends that by delaying arrest, the police improperly affect those rights he would have if he was arrested and subsequently arraigned. The Wyoming Supreme Court, quite properly, rejected this reasoning in light of the unequivocal holding found in Hoffa v. United States. Auclair v. State, supra at 1162; Hoffa v. United States, 385 U.S. 293, 17 L.Ed.2d 374, 87 S.Ct. 408 (1966), reh. denied 386 U.S. 951, 17 L.Ed.2d 880, 87 S.Ct. 971 (1967). Hoffa argued that he could have been arrested prior to the time of a damaging conversation with a government informer. Hoffa claimed that the failure to arrest amounted to a flouting of Hoffa's Sixth Amendment right to counsel. The Court made the following observations in disposing of this claim.

> Nothing in Massiah, in Escobedo, or in any other case that has come to our attention, even remotely suggests this novel and paradoxical constitutional doctrine and we decline to adopt it now. There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to halt a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a conviction. (Emphasis added).

Id. at 311.

Nothing has changed to alter the holding set out above. Again, the decisions of this court clearly indicate that the

actions of the Wyoming Supreme Court in affirming Appellant's convictions were completely in accord with the decisions of this Court.

CONCLUSION

Appellant asserts that he was denied his right to counsel under the Sixth Amendment. He asserts that the issues he raises have not been decided by this Court. As the foregoing authority indicates, this is simply not true. Under the decision of this Court, the Appellant has not presented a substantial Federal issue for appellate review. Accordingly, under Rule 16.1(b) of this Court, the appeal should be dismissed.

For all of the foregoing reasons, Appellee moves that this appeal be dismissed.

DATED this 28th day of September, 1983.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gerald A. Stack, a member of the Bar of the Supreme Court of the United States and counsel of record for the State of Wyoming, appellee herein, hereby certify that on September 28th, 1983, pursuant to Rule 33.1 I served a copy of the attached Motion to Dismiss on each of the parties required to be served as follows:

On Paul Auclair, appellant herein, by depositing said copy in the United States Post Office, Cheyenne, Wyoming, with first class postage prepaid, properly addressed to the post office address of Paul Auclair, appellant Pro Se.

All parties required to be served have been served. Dated September 28th, 1983.

Gerald A. Stack

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